

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In The Matter of)
)
Policy and Rules Concerning the)
Interstate, Interexchange Marketplace)
)
)
Implementation of Section 254(g) of the)
Communications Act of 1934, as amended)

CC Docket No. 96-61

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COMMENTS OF
AMERICA'S CARRIERS
TELECOMMUNICATION ASSOCIATION
("ACTA")

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SUMMARY

America's Carriers Telecommunication Association ("ACTA"), on behalf of its members and the public it serves, urges the Commission to eschew its predilection for mandatory detariffing and adopt a modified permissive tariffing scheme instead. To counterbalance the Commission's concerns over the costs of administering a continued filed tariff regime, ACTA urges the Commission to outsource such management to a private "tariff administrator," an independent entity free from any direct or indirect ties to any local, interexchange or international carrier. ACTA urges further that the degree of independence of any contractor be pronounced.

ACTA supports the concept of lifting the restrictions on offering bundled services as potentially pro-competitive and a potential boon for end user customers. However, the Commission must help bring this new opportunity to the marketplace in a manner that will, to the largest extent possible, ensure that the benefits of bundling are not limited to the large user community, are not used in an anti-competitive fashion and do not result in predatory practices.

In addition, should the Commission lift the bundling restriction, serious consideration must be given to reclassifying AT&T as a dominant carrier. No other entity will have the size, resources and manufacturing capability to exploit the bundling of telecommunications services and equipment to all segments of the marketplace, from residential to small and large businesses and institutions.

ACTA opposes, at this time, any reduction or elimination of the separation requirements for non-dominant treatment of local exchange carriers in their provision of interstate, interexchange services. Such relaxation is, once again, jumping the gun of reality. Significant

time remains before the local markets will possess effective competition sufficient to protect against the misuse of the bottle-neck power of local telephone exchanges.

ACTA encourages the Commission's consideration of redefining relevant product and geographic markets. However, ACTA submits that a realistic appraisal of today's competitive environment will lead to different definitions from those proposed in the NPRM.

ACTA believes the Commission's concerns over "tacit price coordination" is overstated and mis-focused. For example, the concern rests on the assumption that by mandating detariffing, the Commission will eliminate the potential for tacit coordination. It has not been shown that published tariffs produce such coordination or that such coordination actually exists. Moreover, given the existence of the over 4,000 contract tariffs filed by AT&T, its continued use of VTNS offerings, its multitude of pricing plans and its infinite capacity to provide promotional offerings (pricing options also available to all other carriers), it is difficult to see how today's "tariffed" environment has made such coordination possible.

The Commission should exercise caution in promoting additional facilities-based competition. Excessive duplication of plant in certain segments of the industry may be counterproductive to advancing competition. At the same time, ACTA has witnessed a growing concern and need for non-facilities-based carriers, which have achieved some success in the marketplace, to install at least some of their own facilities in order to better master their continued competitive destinies. ACTA urges the Commission not to become too enamored with facilities-based expansion, except where such expansion clearly provides the best avenue for increasing competitive alternatives, such as in the local loop. The Commission's resale policy

has served the nation well and should continue to receive the Commission's ardent support in all segments of the telecommunications industry.

ACTA supports some form of limited geographic rate averaging rules, narrowly tailored to produce defined public policy goals. ACTA reserves further comment on this issue until it has the opportunity to understand what others in the industry perceive this mandate to entail.¹

¹ ACTA understands that certain of its comments, in this Summary, address issues for which comments are not due until April 25, 1996 (NPRM ¶ 113). ACTA's detailed comments, submitted herewith, will be limited to the issues raised by Sections IV, V and VI. ACTA's detailed comments on Sections III, VII, VIII and IX, will be submitted April 25, 1996, as scheduled.

DETAILED COMMENTS FOR APRIL 19, 1996 FOR CC DOCKET NO. 96-61 SECTIONS IV, V AND VI

INTRODUCTION

America's Carriers Telecommunication Association ("ACTA"), by its attorneys, submits its initial comments in response to the Notice of Proposed Rulemaking, released March 25, 1996, in CC Docket No. 96-61 ("NPRM").² ACTA is a national trade organization whose membership consists primarily of interexchange carriers, and also includes operator service providers, payphone vendors, competitive local service providers, equipment vendors, consultants and others interested in, and dependent upon, the advancement and maintenance of fair and equal competitive conditions in the present and future telecommunications marketplace.

IV. DEFINITION OF RELEVANT PRODUCT AND GEOGRAPHIC MARKETS

A. Relevant Product Market

1. ACTA agrees that a re-examination of the relevant product and geographic markets is necessary. In today's and the coming environment, overly-broad definitions of relevant product and geographic markets could lead to anti-competitive abuses. For example, if bundling restrictions are lifted, AT&T's unique strengths in this area may well result in the necessity to reclassify AT&T as a dominant carrier. Moreover, the Commission itself has recognized that in certain market segments, such as 800 directory assistance and analog private line (NPRM @ 40), AT&T possesses the power to dominate those segments. ACTA agrees that wherever such a situation exists, a separate relevant product market should be established.

² References to the NPRM will be by paragraph number.

2. When defining product markets, the Commission must take into account many factors, including customer classifications: residential, small/medium sized businesses, large businesses, etc.. Currently, there is evidence that AT&T has over 70% of the residential market. If it is able to bundle standard CPE equipment, local services, wireless access, etc., via its own cellular and PCS systems and Internet access, AT&T will be able to dominate the residential marketplace.

3. AT&T's dominance of the residential market will, in turn, continue to allow AT&T to subsidize its business market customer offerings, which will be further enhanced by its ability to bundle new equipment and services so as to increase or, at the very least, cement its control over the lion's share of this most important, highest profit segment of the telecommunications marketplace. Moreover, AT&T is positioned to capitalize on its resources to enter and control developing markets, as is obvious from its recent announcements on Internet access, its successful efforts to have Congress eliminate its equal access obligations for its wireless systems in the Telecommunications Act of 1996 (§§ 601(a)(3) and 705) which eliminated the obligations imposed by the *McCaw Consent Decree*.³

4. In the meantime, AT&T continues to move aggressively to develop its presence in the local loop market. Already, its LRN system for number portability has been accepted in several states and by its major competitors. It also continues to eliminate the potential for resale of some of its more attractive interexchange services. Through contract tariffs and other means,

³ *United States v. AT&T Corp. and McCaw Cellular Communications, Inc.*, Civil Action No. 94-01555 (U.S.D.C. D.C. 1994). The lifting of these restrictions on AT&T was promptly followed, or dovetailed, by AT&T's cancellation of contracts with small IXC's to handle their customers' long distance traffic, originated over AT&T's wireless systems.

AT&T has all but eliminated aggregation offerings of its 800 services and precluded resale of its Tariff 12 and SDN product offerings. AT&T will remain dominant in 800, 800 directory assistance, international services and other areas. What seems obvious is that AT&T's dominance in all these areas, with its new freedoms to bundle, enter the local loop and roll out advanced services, so as to chill the marketplace for others providing those services, requires a major overhaul of the relevant product market definition.

5. ACTA urges the Commission to consider the rapidly changing landscape of telecom offerings and make determinations based thereon. In doing so, the Commission should not rely on the existence of major rivals, like MCI and Sprint, or the eventual entrance of the BOCs, to provide effective safeguards against AT&T's ability to manipulate its array of weapons to dominate the whole spectrum of telecom services of today and tomorrow. While the BOCs may now enter manufacturing, there is no assurance that such freedom will ever equal the capabilities on the equipment side AT&T has from the ownership of its well-established and premiere manufacturing arm. The Commission should consider the unique abilities of AT&T to combine its many offerings to dominate all segments of the market. To do so, a more tailored definition or definitions of product markets will be required.⁴

B. Relevant Geographic Market

6. The eventual entry of the BOCs and GTE into long distance, requires a new definition of relevant market. The existence of interexchange and local loop cross-ownership

⁴ A customer will no longer look at 800 service, or outbound or wireless service alone. Customers will be looking at a combination of services in making purchasing decisions. Therefore, to the extent the Commission's definition is limited to discreet service offerings, like 800, or analog private lines, such a definition will not address the relevant products which are, and will ever-increasingly be, offered as a package of services and equipment.

interests of such entities will, for the foreseeable future, create large and lucrative markets with special characteristics. Indeed, the entry of these large LECs also requires that existing cross-ownership interests by other IXC's, with LEC properties, or vice versa (Sprint/United, Citizens Utilities, Lincoln Tel, etc.), and those CLECs which are, or intend to, also provide competitive interexchange services, while owning local exchange properties, also support the need for a specific geographic market definition.

7. The Commission's tentative conclusion to treat interstate, interexchange services as a single geographic market, based on the supposed protection against the exercise of market power in a single point-to-point market, may risk overlooking some possibly relevant history in the development of the competitive industry. In the 1970s, AT&T attempted to engage in a route-specific pricing scheme against its then embryonic rival, MCI.

8. Under what was then known as AT&T's "Hi-Lo Tariff" regime, AT&T attempted to justify lower rates on high-density routes by using long-run incremental costing and higher rates on low-density routes. The effect of this pricing structure was, or would have been, to cordon off the more lucrative routes with high volumes of traffic in order to impede the competitive inroads made by the fledgling MCI. AT&T could match MCI's lower pricing on the high-density routes and yet retain high prices on low-density routes where AT&T faced little competition at the time, due to the limits on where MCI could profitably extend its services as a start-up entity.

9. Reliance on geographical averaging may also be questionable as a complete answer here. First, the Commission has yet to define the scope of services to which this principle will apply. There is a body of thought which believes that Congress did not intend to apply its

geographical averaging standard beyond a single basic service. Supporting this concept is the fact that a broader application of such a principle may have adverse consequences to full competitive pricing and require extensive regulatory oversight.

10. Another concern deals with the rationale, expressed by the Commission, that a carrier would not seek to raise its prices throughout the nation to take advantage of market power between two particular cities (NPRM @ ¶51). ACTA suggests that the problem may lie more in the nature of a Hi-Lo pricing scheme, where the prices between two cities (in reality any combination of cities located in the operating territories of the BOCs) are lowered because of the greater ability to maintain control where most of the BOCs interexchange traffic will originate and terminate (60% on average, according to some reports), and where they will enjoy economies of scale, potential cross-subsidies, maximum name recognition and reputation and an optimal regulatory environment.

11. The assumption that customers are unwilling to have two or more carriers provide service to all domestic locations (Id.) may, and probably only does, apply to residential and single-line small business customers. Moreover, the Commission appears to concede this possibility by relying on geographic averaging to require price changes in one point-to-point market to be extended to all residential customers. Id.

12. Some businesses, with major facilities in a given LEC's operating territory, may well find it to their advantage to obtain more favorable rates from the LEC's service attempting to protect its core 60% in-region base, and service from another carrier for out-of-region traffic. California and Texas may present a unique example of this potential. Intrastate traffic in these large states tends to exceed interstate traffic levels. The newly merging BOCs may see their

ability to capitalize on maintaining a strong grip on their in-region markets by cutting prices well below those for their out-of-region services.

13. The Commission's reliance on access services and excess capacity, to ensure the appropriateness of using a national market for defining the relevant geographic market, seems also to be misplaced. (NPRM @ ¶ 52). Although originating and terminating access are subject to some form of price regulation, the consensus of those required to pay these charges is that such regulation is not effective and that access charges are as much as seven times higher than justified. Moreover, ACTA fails to see how wireless services will aid competition in a national market given AT&T's refusal to accord equal access, the BOCs refusal to provide any other interexchange service but their own for their cellular customers, and the FCC's own refusal to find the lack of equal access a matter worthy of its official concern at this time.

14. ACTA fails to see how excess capacity on the four national networks affects the ability of the BOCs, GTE and other cross-owned interests from operating in such a fashion as to require that the relevant geographic market be defined in relationship to their operating territories. Whatever constraints excess capacity may impose on AT&T, and to a lesser degree, its major rivals of today, are not applicable to the LECs when operating in-region. ACTA believes the Commission is on much stronger ground in its analysis, set forth in the following paragraph of the NPRM at ¶ 53.

15. It may be too early to define a relevant geographic market with any lasting precision. The BOCs have yet to enter the interexchange markets and the effect of that entry has yet to be determined. In the meantime, ACTA would support a definition that defines relevant geographic markets by reference to specific guidelines which avoid rigid fixed standards and

evolve based on experience. Starting out, however, a principle guideline would be based on the existence of ownership/management/control of origination and termination facilities, including wireless facilities, related to city pairs served by the entity with the origination and termination facilities. A second guideline would be based on the ownership/management/control of origination facilities and city pairs served by the entity with the origination facilities.

V. SEPARATION REQUIREMENTS FOR INDEPENDENT LOCAL EXCHANGE CARRIER AND BELL OPERATING COMPANY PROVISION OF "OUT-OF-REGION" INTERSTATE, INTEREXCHANGE SERVICES

16. ACTA submits that the failure to maintain the separation of competitive and monopoly-based operations under the Open Network Architecture regime was a major reason that policy designed some 10 years ago failed to open the local loop bottlenecks and succeeded in stifling the growth and diversity of competitive enhanced services. Therefore, ACTA finds it imperative that the separation requirements be maintained intact for out-of-region independent LEC provision of interstate interexchange services.

17. Moreover, given the recent move by AT&T to operate in separate divisions, and the successful operations by the BOCs of their cellular subsidiaries, there is ample evidence that corporate separation is no impediment to viable and effective operations. ACTA also urges the Commission not to change any of the present separations requirements for BOC out-of-region interstate interexchange operations.

VI. RATE AVERAGING AND INTEGRATION REQUIREMENTS OF THE 1996 ACT

A. GEOGRAPHIC RATE AVERAGING

18. ACTA supports geographic rate averaging so that interexchange telecommunications services to subscribers in rural and high cost areas are no higher than rates

charged by each provider of such services to urban subscribers. However, there is a necessary condition to enable compliance with this rule.

19. The underlying costs interexchange carriers pay for access to provide their services cannot be allowed to vary between rural and high cost areas and urban areas. In other words, interexchange carriers cannot be made to average their rates if their underlying costs are not also required to be averaged and therefore uniform.

20. This raises some questions. Is the requirement that some carriers pay USF charges inconsistent with the requirement that underlying costs to serve high cost areas and rural areas be the same? For small carriers saddled with USF charges, keeping their rates uniform penalizes them to the extent that they pay additional access charges to support high cost and rural areas twice. First by having to average their rates and second by having to separately and additionally contribute to subsidizing high cost and rural areas through payments of the USF charges.

21. The penalty is all the more onerous when the USF charges paid support not only far larger companies like the BOCs, but also because the beneficiaries of these payments, the BOCs and other LECs, are or will be in direct competition with these same interexchange carriers. The problem is compounded by the fact that all interexchange carriers are also saddled with state fees and assessments, plus the burden of more and more municipalities imposing local taxes on interexchange services.

22. Any rule the Commission adopts on geographic averaging must account for these burdens. The Commission must assure that any rule it adopts will apply in such manner that no carrier will be required to provide averaged pricing where its costs are not also averaged. ACTA urges the Commission to consider these issues in the context of its preemptive powers, powers

the Commission clearly perceives it has in terms of state requirements for geographic averaging found to be inconsistent with the rules the Commission adopts on averaging (NPRM @ ¶ 68). ACTA's position would appear to be consistent with the Commission's recognition that there may be circumstances in which for higher public interest goals, the Commission might find it necessary to forebear from imposing an averaging rule (NPRM @ ¶ 69).

23. ACTA disagrees with the Commission's tentative conclusions on how best to enforce an averaging rule. ACTA's disagreement stems from the fact that other than the general concept, the scope of services to be covered by the averaging requirement remains uncertain. Is the reported understanding true that the rule will apply only to a generally available "basic rate" or basic set of services? If not, what services will be covered by the rule? Can the concept of contract tariffs be squared with a broadly applicable rule?

24. The decision not to rely on tariffs is premature. The issue of whether the FCC should detariff as proposed is yet to be addressed in comments still to be filed. The effectiveness of a certification process is questionable. The Commission might determine more accurately how effective such a process might be by examining if it can the degree of compliance with similar quasi-voluntary filing requirements, such as the filing of carrier-to-carrier agreements, contracts with foreign correspondents, annual reports on resold international traffic.

25. Reliance on the Commission's complaint process is not a valid alternative. The complaint process has been roundly criticized on a number of grounds, none of which need be detailed here. Suffice it to say, that the Commission's statement of its intent to rely on the complaint process is viewed by many small carriers which have been caught in its morass, as tantamount to the Commission stating it is abandoning any hope of effective enforcement of its

policies. That so few have confidence in the complaint process should be sufficient reason for the Commission to abandon any intent to rely on it in this area.

26. The Commission picks up the theme of the scope of the rule when it discusses the effect of single day notices for tariff filings and the use of such devices as contract tariffs and other plans which allegedly result in basic rates being paid in high cost areas and discounted rates being paid in urban areas. ACTA does not believe there is any mystery about this phenomenon. Large users command large discounts. The larger the user the larger the discount. Most large users reside in urban areas, Smaller users logically reside in rural and certainly high cost areas. Small users get small discounts, if any, from the big carriers. But for resale carriers, small users would get few if any price breaks on service. Small users located in rural or high cost areas therefore logically pay more for their services than do the larger users located in urban areas. Is this deaveraging?

27. If so, there's not a contract tariff which can comply with a geographic averaging rule. If so, truly high volume discount plans also become suspect. Should this require discontinuance of such plans? The answer is no. A more positive answer is that the Commission needs to strengthen and expand its resale policies and their enforcement. Through resale, the burden on small users from the imbalance of high discounts provided to large users located predominantly in urban areas, is significantly ameliorated or eliminated and the benefits of volume discount pricing are left unscathed.

B. RATE INTEGRATION

28. The issues raised by requiring the same rates charged for the same service in one state to be charged in other states is nearly identical to the issues on geographic averaging.

ACTA therefore incorporates its comments in the preceding section here. The Commission must assure that a carrier's cost of operation in one state is not higher than its costs to operate in other states. If it is, then it would be uneconomic to require uniform rates. The alternative would be to have the customers in the lower cost state subsidize the customers in the higher cost state.

29. ACTA is not referring here to the variation in the general costs of doing business which may occur on a state-by-state basis, but to the regulatory, taxes and other government imposed burdens on operations. This area is of particular concern to small carriers because their cost of doing business is likely to be more uniform in all states, or at least the cost differentials are too small to affect rate levels on a state basis. This is particularly true for resellers operating nationally and which find it unnecessary to maintain offices and staff in each state.

30. The potential of state imposed costs is not speculative. Several ACTA members are experiencing artificially imposed costs from overly zealous state regulation in such areas as slamming, billing practices, and debit cards or the institution of municipal taxes.

31. A potentially major new cost which is likely to vary by state will be the costs for negotiating, arbitrating or litigating local interconnection and local resale. Also, the margins for resale each state allows will have a major impact on an interexchange carrier's ability to maintain uniform rates by state once such carriers move into local services packaged with their existing long distance services. In conclusion, any rule adopted in this area must take into account the factors set forth above.

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CONCLUSION

ACTA will study with interest the comments of others and consider submitting modified and/or additional suggestions, support or opposition in reply comments.

Respectfully submitted,

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